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14
15 IN THE UNITED STATES DISTRICT COURT
16 FOR THE DISTRICT OF ARIZONA

17 United States of America,
18
19 Plaintiff,
20
21 v.
22 James W. Clark,
23
24 Defendant.

No. CR-22-00889-01-PHX-MTL

**GOVERNMENT'S RESPONSE TO
SENTENCING MEMORANDUM**

23 **UNITED STATES' RESPONSE TO DEFENDANT'S**
24 **SENTENCING MEMORANDUM**

25 The United States submits this response to Defendant James W. Clark's Sentencing
26 Memorandum and Downward Variance Request ("Def.'s Sentencing Mem."), ECF No. 66.
27 At the outset, the government recognizes that Defendant has faced challenging
28 circumstances during his life and is aware of no information contravening Defendant's

1 representations that he has engaged in recovery and rehabilitation efforts since close to the
2 time of the offense. But the government also notes that Defendant's actions caused
3 government employees to fear for their lives and safety and caused law enforcement to
4 expend resources to address what it deemed to be an immediate threat to public safety. The
5 government respectfully posits that a sentence within the Guidelines is consistent with
6 application of the sentencing factors and is warranted based on the facts here. The
7 government further submits that a term of probation, intermittent incarceration, or home
8 confinement would be wholly inappropriate and would not vindicate the rights of the
9 victims or the public.

10 **I. A SENTENCE WITHIN THE GUIDELINES IS APPROPRIATE UNDER**
11 **THE SENTENCING FACTORS**

12 The Government has addressed the application of the sentencing factors delineated
13 in 18 U.S.C. § 3553(a) in its sentencing memorandum, ECF No. 67, and incorporates those
14 arguments here.

15 The government maintains that the Guidelines calculations set forth in the
16 Presentence Investigation Report ("PSR"), ECF No. 73, are correct, that the various
17 sentencing enhancements set forth therein are applicable, and that Defendant does not
18 qualify for a reduction as a zero-point offender because his offense was one credibly
19 threatening violence. Beyond this, Defendant's Sentencing Memorandum essentially
20 requests a substantial downward variance based on: 1) Defendant's post-offense
21 involvement in rehabilitation programs to address addiction and mental illness issues that
22 Defendant states led him to commit the offense; and 2) an alleged disparity between a
23 Guidelines sentence here and the sentences that were imposed in various other cases in this
24 district and elsewhere, where the threat conduct purportedly was more egregious than
25 Defendant's conduct here.

26 The government does not dispute Defendant's significant rehabilitative efforts here,
27 *i.e.*, that he has been diligently participating in inpatient and outpatient addiction treatment
28 programs since approximately one month after he transmitted the threat. The government

1 acknowledges such efforts; that such efforts set Defendant apart from a great many other
2 defendants; and that such efforts reasonably can be found to establish a basis for a variance
3 here. The government also recognizes that Defendant sent a bomb threat here on a single
4 occasion. And it acknowledges the reasonable principle that more egregious conduct
5 should generally result in a higher sentence. Defendant's conduct here is plainly more
6 limited than situations involving multiple threats, multiple targeted victim offices, or
7 extensive stalking campaigns for partisan, hate-filled, or extortionate reasons. While
8 Defendant admitted that he had the intent to frighten when he sent the threat here, the
9 government reasonably recognizes that his conduct did not encompass these other
10 aggravating factors.

11 At the same time, even absent such factors, Defendant's conduct here was
12 unquestionably serious, engendering fear, causing canine searches and a bomb sweep of
13 the Public Official's home and office, and resulting in partial evacuations of government
14 offices. The Guidelines calculation here is correct based on Defendant's own conduct,
15 which qualifies for various enhancements involving threatening a public official, engaging
16 in conduct evidencing intent to carry out the threat, and the substantial disruption of
17 government business, as the government has argued. (*See* Gov't Resps. to Def.'s Obj.,
18 ECF Nos. 63, 69.)

19 In describing the nature of the offense, Defendant claims that his threat "was a one-
20 time event and always a hoax." (Def's Sentencing Mem. at 3.) Defendant admitted that
21 he transmitted a threat—a "true threat," meaning that, as Defendant stipulated, Defendant
22 meant to communicate a serious expression of an intent to commit an act of unlawful
23 violence to a particular individual or group of individuals, and one that a reasonable person
24 who read Defendant's message would have interpreted as a true threat. (Plea Agreement,
25 ECF No. 47, at 7 n.1.) Importantly, the "prohibition on true threats 'protect[s] individuals
26 from the fear of violence' and 'from the disruption that fear engenders,' in addition to
27 protecting people 'from the possibility that the threatened violence will occur.'" *Virginia*
28 *v. Black*, 538 U.S. 343, 360 (2003) (citations omitted). The record is clear that Defendant

1 put government employees in fear of violence and disrupted state government functions:
2 These are the harms that Defendant caused here, and which should be considered at
3 sentencing. Defendant's statements now that he was not intending to carry out his threat,
4 and in fact detonate an explosive device, Def.'s Sentencing Mem. at 3, were not then known
5 to the recipients of the message or to responding law enforcement. The harms
6 contemplated by the charged statute—fear and disruption—came to fruition here, and the
7 fact that other harms—such as the detonation of a bomb—did not come to pass simply does
8 not expunge the former.

9 Defendant also claims that a Guidelines sentence would “punish him more severely
10 than others in similar circumstances and [] run afoul of federal sentencing law.” (Def.'s
11 Sentencing Mem. at 4.) In support of Defendant's argument that courts have issued more
12 lenient sentences than the Guidelines sentence that the government seeks here, Defendant
13 summarizes public facts from cases in Arizona and elsewhere, citing to press releases that
14 were issued after sentencings. (*Id.* at 5-8.) But Defendant has not set forth the Guidelines
15 range for these other cases, nor does Defendant indicate which sentences were within the
16 Guidelines range for that defendant or were the result of a variance. Defendant has not
17 described the nature of the offense in each case, including the interests of and impact on
18 victims; the defendants' criminal history; or the aggravating and mitigating circumstances
19 that each court considered when crafting a just sentence. Each case presents unique facts,
20 and, as they must, courts engage in individual sentencing determinations based on facts
21 that generally are not publicly available. Therefore, the government respectfully submits
22 that this comparison in which Defendant invites the Court to engage, without the benefit
23 of recourse to all of the relevant facts that each court considered in each case, does not
24 show that a Guidelines sentence here would create a disparity in sentencing for similarly
25 situated defendants.

26 In sum, the government respectfully acknowledges that the mitigation and
27 rehabilitation materials submitted by Defendant and the lack of aggravating circumstances
28 present a basis for Defendant to reasonably argue for a variance. Defendant has made

1 several objections to the calculation of the Guidelines that have yet to be resolved. The
2 government intends to recommend a sentence within the Guidelines, regardless of whether
3 the Court adopts the government's or Defendant's position as to the enhancements that
4 would most significantly affect Defendant's ultimate Guidelines range. As such, and in
5 light of the impact that Defendant's conduct had on the victims, particularly as to disruption
6 and the fear that victims felt, the government takes no position on whether the Court should
7 grant a variance.

8 **II. PROBATION, INTERMITTENT SERVICE, AND HOME CONFINEMENT**
9 **WOULD BE INAPPROPRIATE HERE**

10 Defendant requests probation, the intermittent service of any term of imprisonment,
11 and home confinement, Def's Sentencing Mem. at 1, 2, 8-9, terms that are inappropriate
12 on several grounds, including that they would undermine the sentencing factors in
13 18 U.S.C. § 3553(a). As has been briefed previously, Defendant caused many individuals
14 to fear that their lives were in danger, and he caused substantial disruption to two
15 government offices. A term of custodial, continuous incarceration accounts for the
16 seriousness of the offense, which strikes at one of the tenets of our government: that public
17 officials should be able to do their jobs free from fear and intimidation. And given the
18 number of public officials and election workers who have faced threats to their lives and
19 the safety of their families, such a term of imprisonment is necessary for purposes of
20 general deterrence.

21 Additionally, the imposition of probation, intermittent confinement, or home
22 confinement as proposed by Defendant would undermine the seriousness of the offense
23 and ultimately not reflect the interests of the victims or public here. The record shows that
24 Defendant did not take responsibility for the threat when state law enforcement interviewed
25 him one week after the threat. (PSR ¶ 8.) Even now, Defendant appears to be wavering in
26 truly accepting responsibility for his conduct. Defendant attempts to have it both ways—
27 to distance himself from the charged conduct and the requisite subjective intent underlying
28 the charge by arguing that he was “under the influence of drugs and alcohol,” ECF No. 58,

1 at 6, when he committed the offense, while accepting the benefits of a plea for which
2 Defendant has admitted that he had the “purpose of issuing a true threat” when he
3 transmitted the charged bomb threat. (Plea Agreement, ECF No. 47, at 8.) A custodial
4 term of incarceration here is necessary both to show Defendant the seriousness of his
5 actions and to justly hold Defendant accountable for his criminal conduct.

6 Further, the calculation of the Guidelines range in the Presentence Investigation
7 Report, ECF No. 73, is correct, and therefore probation is not authorized under the U.S.
8 Sentencing Guidelines. Though only advisory for this Court, the Guidelines state that “a
9 sentence of probation is authorized if: (1) the applicable guideline range is in Zone A of
10 the Sentencing Table; or (2) the applicable guideline range is in Zone B of the Sentencing
11 Table and the court imposes a condition or combination of conditions requiring intermittent
12 confinement, community confinement, or home detention as provided in subsection (c)(3)
13 of §5C1.1 (Imposition of a Term of Imprisonment).” U.S.S.G. §5B1.1. The Guidelines
14 further state: “Where the applicable guideline range is in Zone C or D of the Sentencing
15 Table (i.e., the minimum term of imprisonment specified in the applicable guideline range
16 is ten months or more), the guidelines do not authorize a sentence of probation.” U.S.S.G.
17 §5B1.1, Application Note 2 (citation omitted). According to the Presentence Investigation
18 Report, the applicable Guidelines range in this case is in Zone D, and probation is not
19 authorized under the Guidelines. PSR ¶ 59; *see also* U.S.S.G. §5C1.1 (“If the applicable
20 guideline range is in Zone D of the Sentencing Table, the minimum term shall be satisfied
21 by a sentence of imprisonment.”).

22 Similarly, intermittent imprisonment and home detention are not available here.
23 The U.S. Sentencing Guidelines state that, “where the applicable guideline range is in Zone
24 D of the Sentencing Table (i.e., the minimum term of imprisonment specified in the
25 applicable guideline range is 15 months or more), the minimum term must be satisfied by
26 a sentence of imprisonment without the use of” intermittent confinement, community
27 confinement, or home detention. U.S.S.G. §5C1.1, Application Note 9.

1 **III. CONCLUSION**

2 For the foregoing reasons, the United States respectfully requests that the Court
3 sentence Defendant to a Guidelines term of imprisonment, not to include probation, home
4 confinement, or intermittent service, to be followed by a period of supervised release.

5 Respectfully submitted this 7th day of March, 2024.

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